

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

76-2055

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

To be argued by:
Ralph McMurry

-----X
WARDEN, GREEN HAVEN STATE PRISON, :
Respondent-Appellant, :
OSWALD, JONES, MACKELL, LUDWIG, et al. :
Defendants-Appellants, :
-against- :
THOMAS PALERMO, et ano., :
Petitioners-Appellees. :
-----X

BRIEF FOR RESPONDENT-APPELLANT
AND STATE DEFENDANTS-APPELLANTS

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Respondent-
Appellant and State
Defendants-Appellants
Office & P.O. Address
Two World Trade Center
New York, New York 10047
Tel. No. 488-4178

B
P/S

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

RALPH MCMURRY
MARGERY EVANS REIFLER
Assistant Attorneys General
of Counsel

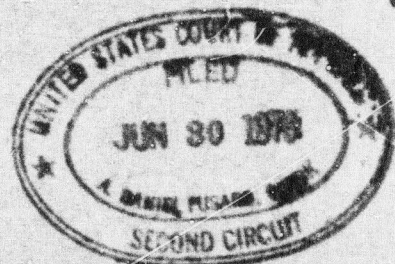


TABLE OF CONTENTS

	<u>Page</u>
Preliminary Statement.	1
Questions Presented.	2
Facts.	3
Prior Proceedings.	17
POINT I - The findings of the District Court that appellee was induced to plead guilty in Queens County by representations not carried out were clearly erroneous. The controlling proof is that the District Attorney promised to recommend to the Board of Parole and that he made such recommendation, the Court erroneously relied upon hearsay evidence of dubious character to reach an extraordinary decision.	20
A. The testimony of Jacob Evseroff.	23
B. The "testimony" of Edward Bobick.	28
C. Other "evidence" of a "parole promise".	34
D. "Bad Faith".	36
POINT II - Assuming arguendo the Queens District Attorney did promise parole to Palermo on his Richmond County sentence, such a promise was <u>ultra vires</u> and does not bind the State. Such a bargain is not a plea bargain within the meaning of <u>Santobello v. New York</u> , 404 U.S. 257 (1971).	38

POINT III	- The District Court's decision sanctifies the return of some of the stolen loot and defies the basic purpose of law. Stolen property is an unlawful consideration. A "plea bargain" is not a plea bargain within the meaning of <u>Santobello v. New York</u> and is unenforceable.	46
POINT IV	- Palermo's failure to return \$1,000,000 was a material breach of the "plea bargain".	50
POINT V	- Specific performance of this "plea bargain" was unlawful and inappropriate. At most the Queens County plea was the extent of the Court's jurisdiction.	52
POINT VI	- Judgment in favor of Mackell, Ludwig and other defendants should be entered <u>nunc pro tunc</u> as of July 26, 1971.	56
POINT VII	- It was an abuse of discretion for the District Court to deny defendants Jones and Oswald costs and attorneys' fees in the civil rights action when plaintiffs failed to present any evidence at all that they were involved in a plea promise.	57
Conclusion.		66

TABLE OF CASES

	<u>Page</u>
<u>Acevedo v. INS</u> , ____ F. 2d ____ (2d Cir. 4/29/76, Slip Op. 3517)	61
<u>ADM Corp. v. Speedmaster Packaging Corp.</u> , 525 F. 2d 662 (3rd Cir. 1975)	65
<u>Alpine Pharmacy, Inc. v. Chas. Pfizer & Co., Inc.</u> , 481 F. 2d 1045 (2d Cir.), cert. den. 414 U.S. 1092 (1973)	63
<u>Alyeska Pipeline Service Co. v. Wilderness Society</u> , ____ U.S. ____, 95 S. Ct. 1605 (1975)	57
<u>Application of Dooley</u> , 65 Misc. 2d 306 (N.Y. Co. 1971)	44
<u>Blackwood v. State</u> , 299 N.E. 2d 622 (Ind. App. 1973)	48
<u>Chicago Sugar Co. v. American Refining Co.</u> , 176 F. 2d 1 (7th Cir. 1949), cert. den. 338 U.S. 948 (1950)	64, 65
<u>Class v. Norton</u> , 505 F. 2d 123 (2d Cir. 1974)	62
<u>Correale v. United States</u> , 479 F. 2d 944 (1st Cir. 1973)	46
<u>Doe v. Poelker</u> , 515 F. 2d 541 (8th Cir. 1975), petition for cert. filed 44 U.S.L.W. 3242 (9/20/75)	62
<u>Electronic Specialty Co. v. International Controls Corp.</u> , 47 F.R.D. 158, 160 (S.D.N.Y. 1969)	65

	<u>Page</u>
<u>Esso Standard (Libya), Inc. v. SS Wisconsin,</u> 54 F.R.D. 26 (S.D. Tex. 1971)	65
<u>Farmer v. Arabian American Oil Co.,</u> 379 U.S. 227 (1964)	64
<u>Geisser v. United States,</u> 513 F. 2d 862 (5th Cir. 1975)	43
<u>Hall v. Cole,</u> 412 U.S. 1 (1973)	57
<u>Heartshill v. State,</u> 341 P. 2d 625 (Okla. Ct. Crim. App. 1959)	49
<u>LaFay v. Fritz,</u> 455 F. 2d 297 (2d Cir. 1972)	19
<u>Lindlots Realty Co. v. Suffolk County,</u> 278 N.Y. 45 (1938)	44
<u>Local No. 148 I.U.U.A., A & A. I.W..v.</u> <u>American Brake Shoe Co.,</u> 298 F. 2d 212 (4th Cir.), cert. den. 369 U.S. 873 (1962)	62
<u>Lynn v. Caraway,</u> 252 F. Supp. 858 (W.D. La. 1966), affd. 379 F. 2d 943 (5th Cir. 1967), cert. den. 313 U.S. 951 (1968)	29
<u>Matter of Zucker v. New York City Employees</u> <u>Retirement System,</u> 27 A D 2d 207 (1st Dept. 1967)	44
<u>Maldonado v. Parasole,</u> 66 F.R.D. 388 (E.D.N.Y. 1975)	65
<u>Mosher v. LaVallee,</u> 491 F. 2d 1346 (2d Cir. 1973), cert. den. 416 U.S. 906 (1974)	19
<u>Newman v. Piggie Park Enterprises,</u> 390 U.S. 400 (1968)	62

	<u>Page</u>
<u>People v. Campbell</u> , 35 N Y 2d 227 (1974)	39, 41
<u>Popeil Brothers, Inc. v. Schick Electric Co., Inc.</u> , 516 F. 2d 772 (7th Cir. 1975)	64, 65
<u>Preiser v. Rodriguez</u> , 411 U.S. 475 (1973)	18
<u>Romero v. Garcia and Diaz</u> , 286 F. 2d 347, 356 (2d Cir. 1961), cert. den. 365 U.S. 869.	38
<u>Santobello v. New York</u> , 404 U.S. 257 (1971)	2, 39, 46, 47, 52
<u>Seif v. City of Long Beach</u> , 286 N.Y. 382 (1941)	44
<u>Sorenson v. City of New York</u> , 99 F. Supp. 411 (S.D.N.Y. 1951), affd. 202 F. 2d 857 (2d Cir. 1953), cert. den. 347 U.S. 951 (1954)	45
<u>Stamatiou v. United States Gypsum Co.</u> , 400 F. Supp. 431 (N.D. Ill. 1975)	48
<u>State of Alaska v. Bogenrife</u> , 513 P. 2d 13 (1973)	44
<u>State v. Ashby</u> , 195 A. 2d 635 (App. Div. N.J. 1963)	48
<u>Stolberg v. Members of Board of Trustees</u> , 474 F. 2d 485 (2d Cir. 1973)	62
<u>Sutton v. United States</u> , 256 U.S. 575 (1921)	44
<u>Trans World Airlines v. Hughes</u> , 515 F. 2d 173 (2d Cir. 1975), cert. den. ____ U.S. 44 U.S.L.W. 3473 (2/23/76)	64, 65
<u>Undersa Eng. & Const. Co. v. ITT</u> , 429 F. 2d 543 (9th Cir. 1970)	62

	<u>Page</u>
<u>United States v. Battle</u> , 467 F. 2d 568 (5th Cir. 1972).	46
<u>United States v. Boulrier</u> , 359 F. Supp. 165 (E.D.N.Y. 1972).	39, 42
<u>United States v. Bridgeman</u> , 523 F. 2d 1099 (D.C. Cir. 1975).	39, 48
<u>United States v. Carter</u> , 454 F. 2d 426 (4th Cir. 1972) (en banc), cert. den. 417 U.S. 933 (1974).	42
<u>United States v. Goodrich</u> , 493 F. 2d 390 (9th Cir. 1974).	39
<u>United States v. Gorham</u> , 523 F. 2d 1088 (D.C. Cir. 1975).	39, 48
<u>United States v. United States Gypsum</u> , 333 U.S. 364, 395 (1948).	37
<u>United States v. Long</u> , 511 F. 2d 878 (7th Cir. 1975).	39, 43
<u>United States v. Nathan</u> , 476 F. 2d 456 (2d Cir. 1973).	39, 42, 50
<u>United States ex rel. Brown v. LaVallee</u> , 424 F. 2d 457 (2d Cir. 1970), cert. den. 401 U.S. 942 (1971).	38
<u>United States ex rel. Selikoff v. Commis- sioner of Correction</u> , 524 F. 2d 650 (2d Cir. 1975).	51, 54
<u>Wolff v. McDonnell</u> , 418 U.S. 539 (1974).	18

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
WARDEN, GREEN HAVEN STATE PRISON. :
Respondent-Appellant, :
OSWALD, JONES, MACKELL, LUDWIG, et :
al, Defendants-Appellants, :
-against- :
THOMAS PALERMO, et ano., :
Petitioners-Appellees.:
-----X

BRIEF FOR RESPONDENT-APPELLANT
AND STATE DEFENDANTS-APPELLANTS

Preliminary Statement

Respondent-appellant appeals from a judgment of the United States District Court for the Southern District of New York (Griesa, J.) granting petitioner-appellee's ("petitioner") application for a writ of habeas corpus. The judgment was dated May 19, 1976 and directed that the appellee be released from all custody.

All state defendants save Oswald and Jones also appeal insofar as the judgment entered below in their favor dismissing the civil rights complaint was not made nunc pro tunc as of July 26, 1971 and state defendants Oswald and Jones appeal insofar as costs and attorneys' fees were not awarded to them in connection with the dismissal, with plaintiffs' consent, of the complaint against them.

Questions Presented

1. Whether the District Court's findings of fact were clearly erroneous?
2. Whether, assuming arguendo that the Queens District Attorney promised early parole to Palermo for agreeing to return stolen property, such promise was ultra vires and not binding on the State and whether a bargain based on such a promise was a "plea bargain" within the meaning of Santobello v. New York, 404 U.S. 257 (1971)?
3. Whether stolen property is a lawful consideration, and whether a plea bargain in which stolen property is the consideration is a "plea bargain" within the meaning of Santobello v. New York, 404 U.S. 257 (1971)?

4. Whether Palermo's failure to return \$1,000,000 of stolen jewels was a material breach of the "plea bargain"?

5. Whether specific performance of the "plea bargain" in this case so as to release Palermo from all custody was lawful or appropriate or whether in such event the matter should have been remanded to the state court?

6. Whether as to certain state defendants judgment should not have been entered nunc pro tunc as of July 26, 1971?

7. Whether the District Court abused its discretion in denying defendants Oswald and Jones costs and attorneys' fees when plaintiffs introduced no evidence against them at trial?

Facts

On the morning of February 17, 1969, several men robbed the Provident Loan Society in Queens County of approximately \$4,000,000 worth of jewelry.* The jewels had been pledged to Provident by over 2,000 Queens residents who had borrowed money from Provident by using their jewelry as collateral.

-3-

* The value may have been as much as \$8,000,000 (286). All unlettered numbers in parentheses refer to trial transcript unless otherwise noted. Numbers preceded by letter "A" refer to pages of appendix.

That same morning two men were scheduled to go on trial in Staten Island for another armed robbery that had occurred in Richmond County. The names of the men, who were out on bail at the time, were Thomas Palermo and Sheldon Saltzman.

Thomas Palermo and Sheldon Saltzman arrived late for their trial on February 17, 1969. When they arrived for their trial, they were remanded.

Saltzman testified at the hearing below that he was late for the Richmond County trial because he was busy robbing the Provident Loan Society (283-284). Saltzman testified further that Palermo was not involved in the robbery, and that he told Palermo that he had been in a "car accident" and accordingly had been detained (284).

Palermo and Saltzman were found guilty in Richmond County in February, 1969, after a jury trial. They remained in custody pending sentence in that case.

Both Palermo and Saltzman soon thereafter became suspects in the robbery of the Provident Loan Society in Queens County. They were arrested for the crime in May, 1969 while still awaiting sentence on the Richmond County conviction.

Around this time, a long series of negotiations began for the return of the jewelry. These negotiations, which lasted through October, 1969, were extraordinary. Basically, Palermo and Saltzman sought in the negotiations to withhold \$4,000,000 worth of stolen jewels in exchange for certain numerous considerations. In this endeavor they were aided by two members of the New York State Bar. These individuals, Jacob Evseroff and Edward Bobick, represented Palermo and Saltzman at various stages of the proceedings in state court. Also participating in the negotiations were several lawyers from the law firm of Rein, Mound and Cotton in New York City. This firm represented Provident and its insurer, victims of the crime.

According to Palermo, the first offer was a promise of ten years sentence on the Richmond County conviction if he returned the jewelry (38, 40). This offer, which was made in the spring of 1969, allegedly came from Detective O'Conner and Queens Assistant District Attorney DeMakos. Palermo claimed that at that time he knew nothing of the robbery in Queens.

The second offer came through Palermo's then attorney, Jacob Evseroff. According to Palermo, Evseroff stated that "officials" were offering seven years to Palermo and five years to

Saltzman on the Richmond County conviction in exchange for the return of the jewels (42). Palermo's response was that he "knew nothing" (43).

The third offer, which apparently followed Palermo's arrest for the Queens robbery, but preceded indictment, came through his new attorney, Edward Bobick, Evseroff having been discharged (45). According to Palermo, this third offer was five years for Palermo and three years for Saltzman on the Richmond County conviction, \$100,000 reward from the insurers of Provident Loan, and a dismissal of the robbery charges in Queens County (43, 44). Palermo says he accepted this deal (46).

Palermo testified that this third deal fell through because a member of the Queens County District Attorney's office, one Mr. Gaudelli, was insisting on seven years for Palermo on the Richmond County conviction rather than five. This was rejected by Palermo and Saltzman (47-49).

Palermo and Saltzman were subsequently sentenced in Richmond County on June 27, 1969. Palermo received a sentence of zero to twenty-five years and Saltzman received a sentence of zero to fifteen years.

The next proposed deal, the fourth offer, apparently came after Palermo and Saltzman had been indicted in Queens for the jewel robbery at Provident. This offer came through Bobick, Palermo's then attorney. According to Palermo, Bobick claimed to have a "deal" from Thomas Mackell and his Chief Assistant Frederick Ludwig. The terms of this "deal" were resentencing in Richmond County in which Palermo would get seven years and Saltzman five; parole after one year on those sentences; a \$100,000 reward from the insurers of Provident, and a plea to a lesser charge in the Queens robbery case with a suspended sentence or unconditional discharge. According to Palermo, this deal was accepted and Bobick left to make the "necessary arrangements" (52-55).

At this point, according to Palermo, Evseroff came to visit him several days later with Captain O'Conner (55). Evseroff was the lawyer Palermo had previously discharged and Palermo claims Evseroff came uninvited (A.61). However, Evseroff claims he came to see Palermo at Palermo's request (323, 326).

According to Palermo, Evseroff told him that Bobick was lying. There was not going to be a resentencing in Richmond County, Evseroff allegedly said, nor was there to be a \$100,000 reward. However, Evseroff had a new deal, allegedly from Ludwig. Accordingly to Palermo, this deal involved (1) a "fee" of \$50,000 for

Evseroff, of which Palermo would get \$10,000; (2) parole for Palermo in eighteen months on the Richmond County sentence of twenty-five years through the "intercession" of the Parole Board; (3) only five years of parole supervision; (4) a suspended sentence or unconditional discharge for the Queens robbery; (5) a plea to a misdemeanor on an outstanding charge against Palermo in Utica to be followed by an unconditional discharge or suspended sentence; (6) dismissal of the Utica charges against two co-defendants; (7) a dismissal of an unrelated assault case pending against Palermo in Queens; (8) a plea to the Queens robbery and a sentence of an unconditional discharge or suspended sentence, and (9) special custodial arrangements for Palermo and Saltzman (55-62).

Palermo asked O'Conner to "check into" the question of parole after eighteen months. O'Conner allegedly reported that Ludwig had said that parole commissioner Jones had said the parole board would accept the District Attorney's recommendation to have Palermo paroled in eighteen months on his Richmond County sentence (63-64).

Palermo then contacted Bobick. Bobick was confronted with the fact Evseroff had told Palermo he (Bobick) was lying. Bobick assured Palermo that he was not lying and that his deal - the fourth - was still good (66-69). Palermo testified he believed Bobick and did not bother to contact Evseroff again about Evseroff's proposed deal (69).

Palermo's belief in Bobick's version of the deal proved ill-founded. Bobick soon appeared with Norman Rein, a lawyer for Provident Loan, and advised Palermo that a resentence in Richmond County was now impossible because "some official" there would not consent (70-71). Thus, the fourth proposed deal collapsed.

The indefatigable Bobick, however, was ready with a sixth proposed deal. In exchange for returning the stolen jewels, Palermo would receive (1) parole on his Richmond County sentence after one year in jail; (2) \$100,000 reward; (3) a suspended sentence or unconditional discharge following a plea of guilty to the Queens robbery charge; (4) dismissal of an unrelated assault case pending against Palermo in Queens County and (5) an unconditional discharge or suspended sentence following a plea to a misdemeanor in a case pending against Palermo in Utica, New York (71).

Palermo also testified that he was told a meeting had taken place at which was present a member of the parole commission, Howard Jones, and at which the facts of Palermo's case were reviewed.

Palermo testified that Bobick sent him a telegram after the claimed meeting with Jones. The telegram said the meeting was "successful" and "congratulations" (79). Later Bobick confirmed that at such meeting a commitment had been obtained from the parole board and that Palermo would be paroled after one year if he returned the jewels (79-80). Bobick was not present at this meeting with parole commissioner Jones, however.

In fact, the meeting with Commissioner Jones was anything but "successful." Detective Caparell, and Eugene Leiman, a member of the law firm of Rein, Mound and Cotton were present at that meeting. Both testified that Jones made no commitment (215, 257, 360, 384). There was no evidence whatever presented at trial that anyone told Bobick that the meeting was "successful."

On October 24, 1969, a meeting took place between Norman Rein, Captain O'Conner, Bobick and Palermo. According to Palermo, the deal was worked out essentially according to the terms of the sixth deal described above (73-74). The deal was accepted by Palermo. Rein, Bobick and O'Conner then left.

Shortly thereafter on the same day, Rein, Bobick and O'Conner returned to announce the deal was off. Palermo says he was told that Mackell would not consent to the insurer paying out the \$100,000 reward. Palermo agreed to accept the deal less the \$100,000 (80-81). Later Palermo was to claim that he had been "defrauded" out of the stolen jewelry and coerced into waiving a reward which was rightfully his. Amended Complaint, par. 17A.

Palermo then claimed that a meeting was held later the same day - October 24, 1969 - to firm up the final deal. Present at the alleged meeting were Palermo, Rein, O'Conner, Ludwig, Bobick, Bobick's wife, Detective Caparelli, two other detectives, and an assistant district attorney. Palermo claims Ludwig reiterated the terms of the agreement as set forth in the sixth proposed deal described above, less the \$100,000 reward. Most importantly for purposes of this case, Palermo claims Ludwig promised he (Palermo) would be out on parole after eighteen months (82).

All the other witnesses who testified in this case on the subject of the "promise" of parole gave testimony opposite to or inconsistent with Palermo's testimony.

Ludwig gave a completely different version of what promises he had made with respect to parole. Ludwig testified that he promised the Queens District Attorney's office would use its best efforts with the Parole Board to obtain "maximum lenient treatment." This would consist of a letter of recommendation to the Board or a personal appearance before the Board (280). Detective Caparell, who Palermo claims was at the alleged final meeting, testified that Ludwig never stated to any one at any time that he would guarantee, promise, or otherwise arrange for Palermo to get out of jail after a specific period of time (258). Caparell also testified that Ludwig wanted him present as a witness to all conversations on the subject to which he (Ludwig) was a party (209, 229). Ludwig also denied ever speaking to Howard Jones, the parole commissioner who according to Evseroff allegedly had made a parole commitment to Ludwig (280).

None of the other persons at the alleged final meeting of October 24, 1969, where the alleged final deal was agreed upon, were called as witnesses by Palermo.

Mackell testified that he would make a great effort and career to have the Parole Board consider leniency for Palermo (178, 184). Mackell flatly denied that he ever promised anyone

that he would guarantee, arrange or insure Palermo's release on parole after a specific period of time (195). He recognized that the sole power he had with respect to parole was the power to make a recommendation (196). He also stated that a recommendation from him to the Parole Board on behalf of a prisoner was unusual and extraordinary (193-194).

Even Jacob Evseroff, one of Palermo's star witnesses, did not testify that Ludwig had promised parole in one year, contrary to Palermo's claim. Evseroff only testified that Ludwig had promised to make a recommendation for early parole (325, 331). He testified Ludwig told him Palermo would have to do at least one year (328). Evseroff's claim that "early" parole "meant" one year to him is unrelated to anything which Evseroff claims Ludwig actually said.

Following the completion of the alleged deal, Palermo made several telephone calls to his wife. Shortly thereafter a considerable portion of the jewels was recovered from the trunk of a car in Manhattan. The car belonged to Palermo's wife (114). Approximately \$1,000,000 worth of stolen jewels however, were missing and have never been returned (192).

On April 16, 1970, Palermo entered a plea of guilty to robbery in the third degree in connection with the Provident jewel robbery. Palermo admitted in his plea participating in the jewel robbery (123). In the evidentiary hearing below, however, Palermo claims he was in no way involved in the robbery (38).

Palermo eventually received an unconditional discharge on the charge in Utica. The assault charge against Palermo in Queens was dismissed.

With respect to parole, Mackell kept his promise to Palermo. He wrote a letter in April, 1970 to the Chairman of the Parole Board recommending leniency for Palermo (A. 43), and included an exhibit describing the importance of the jewel recovery (A. 81). He testified that such a letter of recommendation from him was a very rare occasion and that this constituted an extraordinary effort on his part (193-194). There was evidence that the Queens District Attorney made inquiries concerning a personal appearance before the Board and that the Board did not allow personal appearances (281, 409, 410).

In April, 1970, Norman Rein also wrote a letter to the Chairman of the Board of Parole, recommending leniency for Palermo (A. 87-89). In his letter, Rein described the promise made by

Mackell as a promise to make a recommendation to the Board to fix the minimum possible time Palermo would have to serve in jail. Rein described the promise made by Mackell in a similar terms in a letter to Mackell himself (A. 44).

There was some evidence that Mr. Ludwig of the District Attorney's office and Mr. McCarthy, an employee of the Parole Board, had a conversation in late 1969 in which Ludwig expressed his view that Palermo deserved no leniency. This conversation, however, was followed by Mackell's letter to the Parole Board in April, 1970, recommending leniency. Palermo testified that he knew that a record of the Ludwig-McCarthy conversation was in his parole file because he "took the liberty" to look into his file when the backs of several parole officers were turned (445).

There was uncontradicted evidence at trial that Bobick received a \$25,000 "fee" through Rein, Mound and Cotton, the law firm representing the insurer of the stolen jewels (129, 384).

On June 3, 1970, Saltzman and Palermo appeared before the Parole Board for their minimum period of imprisonment hearing. Saltzman and Palermo both explained the "deal" to the members of the panel. Palermo and Saltzman were told in effect that, while persons outside the parole board may make recommendations, the

Board was not bound by them and made decisions on the merits of each case. Palermo and Saltzman both stated that they understood this (A. 48, 52).

Palermo and Saltzman were given minimum periods of imprisonment of six and five years, respectively.

In August, 1970, Palermo and Saltzman were scheduled to be released on parole according to their version of the "deal." In view of the minimum periods of imprisonment established by the Parole Board, however, they remained incarcerated. Saltzman was eventually released on parole in 1974. Palermo was never found suitable for parole.

Palermo moved in state court to withdraw his guilty plea to the Queens robbery. In his moving papers, Palermo alleged that his lawyer Edward Bobick may have lied to him and inadequately represented him concerning the negotiations with the Queens District Attorney's office (A.56-57). In one of his moving papers, Palermo described the commitment by the Queens District Attorney on the parole question as a commitment "to strongly endeavor to obtain a mitigation of the time which your deponent (Palermo) would have to serve to satisfy the parole commission." (A. 78).

Following a hearing, the motion to withdraw the plea was denied and both Palermo and Saltzman received sentences of an unconditional discharge on robbery convictions involving the theft of \$4,000,000 in jewels. The state court found that representations had been made by the District Attorney to Palermo that he would receive an unconditional discharge.

Prior Proceedings

Plaintiff Thomas Palermo filed an action in federal court in 1970 against numerous defendants, including various members of the Queens District Attorney's office and the Parole Board. The complaint was dismissed as against all save three named defendants in 1971 (Mansfield, J.) in an opinion reported at 323 F. Supp. 478 (S.D.N.Y. 1971). The three individuals who remained in the action as defendants were Russell Oswald, Chairman of the Board of Parole at the time; Howard Jones, a parole commissioner at the time, and Captain O'Conner, a police officer at the time.

Palermo amended his complaint but the District Court (Mansfield, J.) adhered to its decision on July 26, 1971 (A. 36).

Palermo made some attempt at an appeal pro se, but the proceeding was ultimately dismissed. Counsel was obtained for Palermo several years ago.

The case came to trial in April, 1976. The District Court conducted a combined habeas corpus evidentiary hearing and jury trial on the liability and damages issue as to Jones, Oswald, and O'Conner.*

On the morning of trial, Palermo's counsel stated, in response to defense counsel's query that he intended to offer proof of direct promises of early parole by defendants Oswald and Jones (2-3). Judge Mansfield in his opinion had stated that proof of such direct promises and failure to keep them would make out a claim for the deprivation of civil rights, 323 F. Supp. at 484.

At trial, no proof whatever of any kind was offered by plaintiffs to show that Oswald and Jones had made a promise of parole, directly or indirectly. When defendants' attorney moved for a dismissal as to Oswald and Jones for this reason, Palermo's counsel consented and the District Court dismissed the action as to them (477).

-18-

* The Attorney General maintained below and maintains now that such a hybrid proceeding is without basis in law. A jury has no legal authority to hear evidence in a habeas hearing. 28 U.S.C. § 2241, et seq. The Federal Rules of Evidence, 103c, requires that all possible steps be taken to exclude inadmissible evidence from reaching a jury. The Supreme Court has suggested the propriety of separate proceedings. Preiser v. Rodriguez, 411 U.S. 475, 494 (1973); Wolff v. McDonnell, 418 U.S. 539, 534 (1974). Rules of evidence and procedure are also different for each type of proceeding. Harris v. Nelson, 394 U.S. 286 (1969). A bifurcated procedure was required. The District Court rejected this proposition in a brief memorandum (A. 40).

The coordinate habeas claim comes up after the denial by the state court of an application to withdraw the guilty plea in the Queens County Court and it is this withdrawal that was the limit of the habeas jurisdiction by the District Court. As to that, the District Court found, inter alia, that Palermo and Saltzman had been promised parole after one year in prison on the twenty-five year sentence in Richmond County. The promise came from the Queens District Attorney.* The District Court further found that the District Attorney of Queens County acted in bad faith. The District Court found further that, although Queens District Attorney Mackell had written a letter to the Parole Board asking that leniency be shown Palermo (A. 43), such letter was ambiguous and insufficient.

The District Court made particular note of an incident in which Mr. Ludwig of the District Attorney's office had a conversation with an employee of the Parole Board, John McCarthy. In this conversation, Ludwig allegedly said that Palermo deserved no leniency.

* As respondent reads the District Court's decision, Palermo's understanding that he had a promise of parole was not just a subjective impression, but was based on objective, categorical statements made to Palermo by his attorneys and representatives of the District Attorney's office. See LaFay v. Fritz, 455 F. 2d 297 (2d Cir. 1972); Mosher v. LaVallee, 491 F. 2d 1346 (2d Cir. 1973), cert. den. 416 U.S. 906 (1974).

At the close of the hearing on April 22, 1976, without benefit of briefs or argument and clearly in excess of its jurisdiction in the habeas proceeding, the District Court ordered Palermo's immediate release from custody on both the Richmond County and Queens County convictions and sentence. Final judgment was not entered until May 19, 1976.

The respondent and certain state defendants bring this appeal. Respondents' application for a stay pending appeal was denied but respondent's application for an expedited appeal was granted by this Court on June 15, 1976.

POINT I

THE FINDINGS OF THE DISTRICT COURT THAT APPELLEE WAS INDUCED TO PLEAD GUILTY IN QUEENS COUNTY BY REPRESENTATIONS NOT CARRIED OUT WERE CLEARLY ERRONEOUS. THE CONTROLLING PROOF IS THAT THE DISTRICT ATTORNEY PROMISED TO RECOMMEND TO THE BOARD OF PAROLE AND THAT HE MADE SUCH RECOMMENDATION. THE COURT ERRONEOUSLY RELIED UPON HEARSAY EVIDENCE OF DUBIOUS CHARACTER TO REACH AN EXTRAORDINARY DECISION.

The District Court's factual findings were clearly erroneous. The District Court failed to consider or mention critical facts, primarily the extraordinary role played by Palermo's

lawyers, a failure which gives the reader of the District Court's opinion a completely distorted view of what actually transpired in this case. The District Court also relied heavily on suspect hearsay evidence as a substantial part of the proof.

The District Court found that Palermo and Saltzman were induced to plead guilty to the Queens County robbery charge* in connection with the Provident Loan Society robbery and to return \$4,000,000 worth of jewels taken in that robbery. These inducements consisted of alleged promises and representations to them and to their attorneys made by Ludwig and O'Conner that Palermo and Saltzman would be paroled on the Richmond County sentence after one year in prison and that parole supervision would be terminated after five years. These findings of fact were a summary of more detailed findings of fact recited elsewhere in the opinion.

-21-

*This simply points up that the extent of the habeas jurisdiction of the District Court was the review of the Queens County guilty plea and whether the appellee Palermo had a right to have such plea in Queens County withdrawn and stand trial. The District Judge had absolutely no jurisdiction over the Richmond County conviction and sentence, the validity of which could not be questioned in the habeas corpus proceeding and indeed was not questioned.

In making his findings, the District Court chose to believe all plaintiffs' witnesses and none of respondent's witnesses.*

Since the various "offers" frequently came in meetings of three or more people, it is not always clear which individual actually conveyed each offer or portion thereof to Palermo. Accordingly, the evidence of each witness through which the promise of parole (hereafter "promise") allegedly came to Palermo are examined separately below.

-22-

* The District Court's findings were completely opposite to the findings of the state court judge who presided at the state court hearing on the motion to withdraw the plea. Justice Farrell, after hearing numerous witnesses, including Mackell, Ludwig, Palermo, Bobick and Evseroff, found that counsel had advised Palermo and Saltzman that there would be a contact with the Parole Board to inform them of their cooperation in returning the loot. Justice Farrell then concluded:

"I will not find as a fact that this was any commitment to accomplish a sentence of 12 months or 18 months on the Richmond County robbery, and anybody knowing the operation of the Parole Board would realize that. I am convinced that Mr. Mackell and Mr. Ludwig and all those acting on his behalf agree that they would recommend to the Parole Board leniency on the Richmond County matter because of the return of the loot. I think that that has been complied with. I think that Mr. Mackell has done it and I think that he will continue to request it. He cannot deliver the Parole Board. That I am sure of because they are an independent agency."

These findings were entitled to the presumption of correctness.
28 U.S.C. 2254(d)

A. The testimony of Jacob Evseroff

One of the lawyers to whom Ludwig allegedly made a parole promise was Jacob Evseroff.

This finding was clearly erroneous. As noted above, Evseroff never said that Ludwig promised parole for Palermo in one year. Evseroff said only that Ludwig had told him the Parole Board had told him (Ludwig) that Palermo would have to do at least one year and then do five years on parole supervision, and that the parole board would arrange an "early" parole upon the recommendation of the District Attorney (325). Evseroff claimed that "early" parole "meant" to him (Evseroff) that Palermo would be out of jail in one year. However, this is not what Evseroff said Ludwig said. Thus the testimony of Evseroff, even if believed, does not establish the promise which the District Court found was made.

The District Court also erred in failing to consider Evseroff's conduct in assessing his credibility as a witness. This conduct was very disturbing, to say the least.

Evseroff undertook to act for Palermo at a time when he did not represent Palermo. Evseroff claims he visited Palermo at Palermo's request (323, 326), but Palermo claims that Evseroff

came uninvited (A. 61). It was "not completely clear" to the District Court why Evseroff was still in the picture at a time when he did not represent Palermo (A. 20). However, the reason really should be obvious to anyone. Uncontradicted evidence below established that as part of the "deal" Evseroff would receive a \$50,000 fee from the insurer of Provident if the jewels were returned (56). Evseroff thus had clear motive to misrepresent to Palermo the true terms and possibilities of the "deal." Evseroff had a clear motive to tell Palermo whatever Palermo wanted to hear and to tell Palermo whatever might inspire him to part with the jewels.* The motive was \$50,000.

In effect, Evseroff, while purporting to represent the interests of the alleged perpetrator of the crime, was willing to accept a "fee" from a victim of the crime. It is difficult to imagine a more pronounced conflict of interest between a lawyer and his client. Indeed, to accept the "fee" would have been

-24-

*As we show (infra, Point III), the fact that Palermo was induced to return part of the stolen property, whether because his lawyers misrepresented to him the benefits he would receive or some functionary made some statement from which he reached such conclusion is immaterial and no basis in law for the habeas corpus relief accorded here to Palermo exists because a thief is induced to lead the State to the property stolen.

an unethical practice. Code of Professional Responsibility and Code of Judicial Conduct, American Bar Association, DR 5-107(A) (1) (2) (1970).*

The lack of any concern for ethics by this witness is demonstrated by Evseroff's own testimony that he had requested the state trial judge in Richmond County to allow Palermo to remain free on bail over the weekend because he (Palermo) owed Evseroff a substantial fee and Palermo had offered to raise the money by the following Monday. This request of a state judge to render a bail decision on factors unrelated to the merits of the case also demonstrates a gross contempt for the integrity of the judicial process by the witness Evseroff.

It should be noted that Evseroff accused Bobick, the attorney who replaced him, of lying about the terms of the deal (56), a compliment which Bobick in turn paid Evseroff (A. 64).

-25-

* "Except with the consent of his client after full disclosure, a lawyer shall not: (1) accept compensation for his legal services from one other than his client; (2) accept from one other than his client any thing of value related to his representation of his employment by his client."

In the circumstances of this case Evseroff was duty bound to make independent verification with the Parole Board of the extraordinary "deal" he was proposing to his "client". Evseroff admitted, however, that he spoke to no one on the Board about this case (331).

Had Evseroff, allegedly experienced in the practice of criminal law, made a cursory inquiry into the New York laws on parole, he would have understood that even Commissioner Jones, from whom the parole promise had allegedly been obtained by Ludwig, had no authority to make such a "promise." The fact is that parole cannot be promised in advance even by the Parole Board or by any person on the Board. The State Board of Parole is required under state law to make its determinations after assessing assorted psychiatric and social reports concerning the prisoner's attitudes, background, mental condition, and prison record. Correction Law §§ 213, 214. Obviously, whether a prisoner meets the criteria for parole release set forth in Correction Law § 213 could not be determined until a study of this information. Moreover, a single parole commissioner could not bind the Parole Board or the State with a "promise" since state law at the time required parole

release to be determined by the unanimous vote of Board members who interview the prisoner or by the majority of the entire Board of Parole. Panels which determine parole release generally consist of three members. Correction Law § 214(4)(5).

In the final analysis, Evseroff appears to have recognized the above requirements of law and the limitations of any discussion because he did testify that he knew that the Parole Board had the authority to determine who gets out on parole and when, but felt the district attorney had the ability to "influence" the decision of the parole board with a "recommendation" (331).

In view of the foregoing, it is surprising that to such a witness the District Court gave full credence. The District Court made no mention of Evseroff's conduct and motive as bearing on his credibility. Apparently, the District Court considered this unworthy of comment.* This was most unfortunate, and in the circumstances of this case constituted a miscarriage of justice.

* The District Court, however, did find Mackell's motive worthy of comment. The District Court found that Mackell had an "intense interest" in the return of the jewels (A. 18).

Finally, with respect to the clash between Evseroff's version of the "deal" and Bobick's version of the "deal", Palermo himself testified that he believed Bobick and disbelieved Evseroff (69). Thus, it is plain that it is irrelevant what Ludwig told Evseroff or what Evseroff told Palermo. The fact is that Palermo by his own admission disbelieved Evseroff. A fortiori there was no reliance on any representation and no inducement.

B. The "testimony" of Edward Bobick

One of the attorneys to whom Ludwig and O'Conner allegedly made the promise was Edward Bobick who represented Palermo after Jacob Evseroff was discharged. The District Court apparently found that the promises relayed to Palermo by Bobick were accurate statements of those "deals."

Unfortunately, Bobick was never called to testify by the plaintiffs. Palermo himself testified as to what Bobick told him had transpired. Accordingly, any alleged deals as they came through Bobick are clearly inadmissible hearsay insofar as Bobick's statements of the deals were taken by the District Court as proof

of the fact that the deal as stated had in fact been made by the Queens District Attorney. It is clear that this is exactly how the District Court treated Bobick's statements of the various "deals" and this was clear error.*

Palermo's failure to call Bobick, to whom Ludwig allegedly made misrepresentations, give rise to an inference that Bobick's testimony would have been unfavorable to Palermo. See Lynn v. Caraway, 252 F. Supp. 858, 865 (W.D. La. 1966), affd. 379 F. 2d 943 (5th Cir. 1967), cert. den. 313 U.S. 951 (1961). This is especially so as to Bobick, who, as Palermo's lawyer, had a relationship with Palermo such that Bobick would naturally be expected to favor him. McCormick on Evidence, § 249 (1954).

In addition to erroneously accepting Bobick's alleged hearsay statements, the District Court ignored the obvious motives Mr. Bobick had for misrepresenting the true "facts" of the various "deals" to Palermo which would have dissipated the force of any testimony by him if he had been produced as a witness. Uncontradicted

* At trial, the State objected to this kind of hearsay (63, 64, 139, 140). The District Court appeared to appreciate the hearsay problem in this case at the time of trial. However, in its opinion it is evident that any such appreciation had vanished.

evidence showed that the client insurance company of the law firm of Rein, Mound and Cotton paid Bobick the sum of \$25,000 for "legal services" in connection with the return of the jewelry (129, 384). In short, Bobick as lawyer for the convicted perpetrator accepted a \$25,000 fee from the insurance company which in effect was a victim of the crime. It is difficult to comprehend a greater conflict of interest between a lawyer and a client. Even Palermo thought it was "unusual" for a lawyer to accept a fee from his adversary (A. 69). This clearly was a violation of the canons of ethics. American Bar Association, Code of Professional Responsibility and Code of Judicial Conduct, 1970, DR5-107(A)(1)(2). Clearly, Bobick had a strong motive to tell Palermo what Palermo wanted to hear and to tell Palermo whatever might inspire him to part with the jewels. The motive was \$25,000.

In this connection, it must be noted that one of the reasons Palermo sought to withdraw his plea to the Provident robbery was the alleged inadequacy of his lawyer, Edward Bobick. In his sworn statement of December 11, 1970, Palermo charged:

"I now charge and so aver that my former attorneys who represented me in all pre and post indictment phases of this case rendered inadequate and ineffective assistance of counsel in that (a) they did not

properly advise me as to my responsibilities to become involved in negotiations instituted by the Queens District Attorney with me for the return of the property alleged to have been stolen from the Provident Loan Society on February 17, 1969; (b) they failed to properly safeguard my interests in the agreement which was made with the Queens District Attorney based upon such negotiations. . . ." (A. 57)*

Palermo also averred in this sworn statement, that Bobick may have lied to him about the "deal" (A. 76).

The possibility that Bobick was misrepresenting the facts to Palermo becomes a certainty in view of Palermo's testimony that Bobick sent him a "congratulations" telegram after the meeting with Parole Commissioner Howard Jones. According to Palermo, the telegram stated that the meeting was "successful". This of course was far from the truth. All the participants at that meeting who testified agreed that no commitment had been made by Commissioner Jones. Bobick was not even at the meeting. Indeed Bobick told Palermo that he had never spoken to Jones (125). There was evidence that Commissioner Jones at that meeting expressed doubts about Bobick's integrity (360).

-31-

*Palermo apparently includes Evseroff in these denunciations.

Surely, Bobick was under a duty in this case to make an independent verification with the Parole Board as to the bona fides of what was, on its face, an incredible deal. Surely, Bobick was under a duty to advise his client that a prosecutor could only make a recommendation for parole release and that the Board could or could not act on that recommendation and that even members of the Board were without power to "promise" parole in advance.*

Indeed, there can be no doubt about Bobick's utter lack of integrity, competence, or both, in view of Palermo's testimony claiming that Bobick told him that parole decisions were made by six commissioners and that the Chairman of the Board of Parole would vote in case of a tie (96). This simply was not the law. Indeed, it was so far off as to be "ridiculous" (Oswald, 413).** Bobick was either incompetent or lying. Bobick also claimed that the District Attorney was "guaranteeing" one commissioner; the office of Rein, Mound and Cotton was "guaranteeing" two commissioners, and Mr. Oswald, then Chairman of the Board of Parole,

-32-

* See pp. 26-27, ante.

** See Russell Oswald's testimony at 405, 413; see Correction Law 214(4)(5); see p. 26-27, ante.

would break any tie vote and vote in Palermo's favor (96). Not a scrap of evidence was ever presented at trial to back up these outlandish claims (and, of course, as we have pointed out and reiterate this was hearsay testimony, the use of which to support a decision is clearly indefensible).

It is interesting to note that Mr. Leiman of Rein, Mound and Cotton set up the meeting with Parole Commissioner Jones because there was a fear that Bobick was misinformed as to what the law on parole was (358). Leiman also said that Bobick never mentioned the concept of parole in one year (358-359). It appears, therefore, that Bobick may have been singing one song ("one year") to his client Palermo and another song to Rein, Mound and Cotton, through whom he ultimately received his "fee" of \$25,000.

In light of all the above circumstances, the failure of plaintiffs to call Bobick as a witness is not difficult to understand. In an attempt to show an effort to locate Bobick, plaintiff called Ira Deutsch to the stand. Deutsch testified that Bobick was a former associate in the law firm of Bobick, Deutsch and Schlessner (352). He testified that as of October 1, 1975, Bobick had "retired" at the age of 49 and gone to Florida (352, 353, 356). He testified that only four days before trial, Palermo's

attorney had first called him to inquire about Bobick's availability for trial. He testified that he had made phone calls and sent a telegram but got no response (353, 354). This pitiful last minute "attempt" to locate Bobick was feeble at best, and surely cannot support a conclusion that Bobick was not within reach of plaintiff Palermo.

C. Other "evidence" of a "parole promise".

There was some testimony that the alleged parole promises came from Ludwig through O'Conner. O'Conner was ill and could not testify. However, it was O'Conner who came with Evseroff to make the fourth offer, an offer which Palermo ultimately concluded was unworthy of belief. See p. 27, supra. Any alleged representations O'Conner may have made on this occasion thus, even if made, did not induce Palermo to do anything.

O'Conner was also allegedly present in subsequent conferences with Rein, Bobick and Palermo, at which several deals, including the final deal, were offered. However, according to Norman Rein, whom the District Court found was present at these meetings, the commitment made by the Queens District Attorney was

not the commitment the District Court found had been made. Norman Rein described in several letters the commitment made by the Queens District Attorney as a promise to make a strong recommendation to the Board to exercise maximum leniency in Palermo's behalf(A. 44, 87). Bobick was also present at these meetings; his lack of reliability has already been noted (pp. 28-33, ante).

There was, of course, Palermo's direct testimony of what Ludwig said on October 24, 1969, a version Ludwig denies (82, 280). Although the District Judge apparently believed everything Palermo said, it is clear Palermo was hardly the most credible witness. Palermo himself in a statement sworn to September 30, 1970 (A. 78), in behalf of his motion to withdraw the plea in state court, gave a completely different version of the deal than he did in the hearing below. Palermo alleged only that the prosecutor had promised to make a strong recommendation for leniency in "mitigation" of the time he would have to serve. Nothing was said about a "guarantee" of parole in one year by the prosecutor. This "guarantee" was never alleged in state court until December 11, 1970, in a "supplemental affidavit" in support of his motion to withdraw his plea, by which time Palermo had also decided that Bobick had inadequately protected his interests in the negotiations with the Queens District Attorney (A. 56).

Palermo denied in the hearing below ever participating in the Queens jewelry robbery (38); however, in 1970, Palermo admitted participating in the robbery in his guilty plea before Justice Farrell (123). This admission Palermo now attempts to evade because he was not under oath and was given "instructions" by his attorney Bobick concerning the necessity of making "certain statements" (134-135).

D. "Bad Faith".

The District Court found that Mackell and Ludwig acted in bad faith. This conclusion turns on the assumption that its other findings were correct, an assumption which, as shown above, is unfounded. It follows that if the factual findings are in error, the conclusion of bad faith is in error.

The alleged Ludwig-McCarthy conversation (p. 19 , ante) upon which the District Court relied to find this bad faith violation of the plea bargain agreement (A. 28), was followed by Mackell's letter of recommendation to the Parole Board. Whether Ludwig may or may not have expressed his personal opinion, the fact remains that the Queens District Attorney kept its promise. It is plain that District Court had no tenable basis for finding a "bad faith" violation.

The District Court certainly failed to weigh all the evidence properly. Indeed, it is clear that much troubling evidence unfavorable to Palermo was not weighed at all. It was simply ignored. In addition, incompetent hearsay evidence was relied upon. The District Court's opinion is most noteworthy for the disturbing facts it leaves out, facts without which give a completely distorted picture of the events in this case. The District Court's opinion by its silence also gives its blessing to the credibility of Palermo's lawyers. It is substantially through these lawyers that the Queens District Attorney erroneously and unfairly was condemned in this case.

It should be clear in any appraisal of the record that the disposition of the District Court here was indeed completely erroneous. The Supreme Court of the United States has said that "a finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." United States v. United States Gypsum, 333 U.S. 364, 395 (1948). At least, this is clearly such a case, and this Court has not hesitated to reverse when, despite factual findings by a District Court, it appears that a serious error has occurred.

United States ex rel. Brown v. LaVallee, 424 F. 2d 457, 459 (2d Cir. 1970), cert. den. 401 U.S. 942 (1971) (findings of fact clearly erroneous where challenged plea voluntary "in every respect"); see Romero v. Garcia and Diaz, 286 F. 2d 347, 356 (2d Cir. 1961), cert. den. 365 U.S. 869. A review of the entire evidence in this extraordinary case leaves no doubt whatsoever that a serious mistake has been made, a mistake induced by the District Court's complete misconception of the applicable law (See Points II, III, IV, V, *infra*).

POINT II

ASSUMING ARGUENDO THE QUEENS DISTRICT ATTORNEY DID PROMISE PAROLE TO PALERMO ON HIS RICHMOND COUNTY SENTENCE, SUCH A PROMISE WAS ULTRA VIRES AND DOES NOT BIND THE STATE. SUCH A BARGAIN IS NOT A PLEA BARGAIN WITHIN THE MEANING OF SANTOBELLO V. NEW YORK, 404 U.S. 257 (1971).

Assuming arguendo* that the District Court was correct in its findings that the Queens District Attorney promised Palermo release from prison on parole after one year in jail on his Richmond County sentence in exchange for the return of the stolen

-38-

* This is an arguendo supposition we make only to show the lack of any vitality in the decision below and we do it with hesitation because we find no basis for the criticism here of the Queens District Attorney.

jewels, such a promise was ultra vires and not binding on the State and the citizenry it ultimately represents and from whom it obtains the consent and power to govern. United States Declaration of Independence, July 4, 1776. This is true whether the ultra vires promise is viewed in terms of "implied contract", "estoppel" or "agency". The ultra vires nature of the promise fully distinguishes instant case from Santobello v. New York, 404 U.S. 257 (1971). See United States v. Gorham, 523 F. 2d 1088, 1096-1098 (D.C. Cir. 1975) and cases cited therein; United States v. Bridgeman, 523 F. 2d 1099 (D.C. Cir. 1976); People v. Campbell, 35 N Y 2d 227, 360 N.Y.S. 2d 623 (1974); United States v. Long, 511 F. 2d 878 (7th Cir. 1975); United States v. Goodrich, 493 F. 2d 390, 393 (9th Cir. 1974); United States v. Boulrier, 359 F. Supp. 165 (E.D.N.Y. 1972), affd. sub nom. United States v. Nathan, 476 F. 2d 456 (2d Cir. 1973).

Respondent certainly does not quarrel with the general proposition that a prosecutor must keep his promises. When a promise by a public official exceeds his authority, however, the State and the people of the State whom the official purports to bind acquire a strong public interest in disassociating itself from that promise. The people have an absolute right to expect

that public officials will only make those commitments which the law empowers them to make. To hold otherwise is to subject the people to fraud or other unlawful impositions and destroy the fundamental proposition that government obtains its powers only by consent of the governed.

If the Queens District Attorney made a "promise" of parole, he had no authority to do so. A prosecutor under New York law has no authority of any kind to make commitments as to parole. The duties and powers of the District Attorney are limited to prosecuting crimes. New York County Law, §§ 700, 927. The sole and exclusive responsibility, power and authority to make parole decisions ~~lies~~ with the New York Board of Parole. Correction Law §§ 210, 213, 214. The decision to grant or deny parole is a judicial function not reviewable if done in accordance with law. Correction Law § 212.10(7).

In effect, the District Court in this case gave legal effect to an illegal act and usurped the functions and duties of the New York State Board of Parole, an independent agency to whom the people of New York have entrusted the sole responsibility for determining who is released on parole and when. This the District Court had no power or authority to do.

The proposition that the State is not bound by such an ultra vires promise by a public official is established law in both the civil and plea bargaining context.

The law in New York is clear that a prosecutor's unauthorized promise in a plea bargaining situation is without lawful effect. In People v. Campbell, 35 N Y 2d 227, 360 N.Y.S. 2d 623 (1974), a prosecutor had promised a defendant that he could withdraw his plea if he received a prison sentence. The defendant received a prison sentence, and sought to withdraw his plea. The State Court of Appeals stated(at 241):

"Withdrawal of a plea, however, is not within the power of the prosecutor. That power rests solely in the discretion of the court (CPL 22.60, subd. 4). The prosecutor, without authority, promised that which he could not legally perform and the defendant, therefore, could not as a matter of law, rely on that promise.

"The lack of power in the prosecution distinguishes the Campbell situation from that involved in Santobello v. New York, 404 U.S. 257."

The public policy behind the court's reasoning was said to be the preservation of the integrity of the plea bargaining system from the potentially corrupting influences of off-the-record promises, deals and representations. The exact same public interest is present here.

In United States v. Boulrier, supra, a United States attorney in Florida represented to an accused that a Federal indictment in New York would be dismissed in exchange for information. That information was not forthcoming, and the court ruled that since the defendant did not perform his part of the bargain, the government had no obligation to perform its part. However, the court went on at length to reject the proposition that the bargain was otherwise valid, concluding that "... the United States Attorney for the Southern District of Florida had no jurisdiction, power, or authority over the indictment in the Eastern District of New York". Boulrier, 359 F. Supp. at 171.*

Similarly, the "plea bargain" in this case was ultra vires not only because parole is beyond the jurisdiction and authority of the prosecutor, but also because the Queens prosecutor had no authority to make a commitment to Palermo on his Richmond County sentence without the consent or joinder of the Richmond County prosecutor and the Richmond County judge.

* The Second Circuit affirmed sub nom United States v. Nathan, 476 F. 2d 456, 459 (2d Cir. 1973) on the same ground on non-performance of bargain and did not reach the cross-jurisdictional issue. In its discussion of the ultra vires issue, the District Court rejected the decision in United States v. Carter, 454 F. 2d 426 (4th Cir. 1972) (en banc), cert. den. 417 U.S. 933 (1974). Carter was decided over a strong dissent.

In United States v. Long, 511 F. 2d 878 (7th Cir. 1975), a promise by a state official regarding possible prosecution on federal firearms laws was held in the circumstances of that case to be non-binding on the United States. The Court rejected liability based on a theory of agency. Similarly, in this case, the District Attorney is certainly not an agent of the Parole Board or vice versa.

In Geisser v. United States, 513 F. 2d 862 (5th Cir. 1975), the Justice Department promised, inter alia, parole to an accused person in exchange for certain considerations. The Justice Department reneged on the bargain, however, arguing that it was powerless to grant parole which was within the discretion of an independent agency, the Parole Board. The Fifth Circuit was clearly concerned both with the unauthorized commitments of the Justice Department and with the prospect of judicial intrusion into the parole process. The Court declined, however to grant relief. Rather, the Court remanded in the hope that the parties could work out a settlement among themselves. The Court said (at 871):

"Sharing as we do the Government's concern about judicial intrusion into the judicial process we defer until after remand whether we would put our stamp of approval on the District Judge's order which in effect releases Bauer at the end of the reconstructed three year term."

The District Court in this case obviously did not recognize its judicial intrusion into the State's parole process. This lack of concern was especially unfortunate since the Court was interfering, not with the United States Board of Parole but with the New York State Board of Parole, an entity which answers to a different sovereign entirely.

The same principle has been expressed in a myriad of other circumstances. In Sutton v. United States, 256 U.S. 575 (1921), the Supreme Court (Brandeis, J.) held that the Secretary of War was not authorized to contract to spend more than the amounts lawfully appropriated, and his contract to do so would not bind the Government. See also State of Alaska v. Bogenrife, 513 P. 2d 13 (1973) (State not bound by local supervisor's promise to State employees to pay overtime compensation where such payments were unauthorized by law); Lindlots Realty Co. v. County of Suffolk, 278 N.Y. 45, 53 (1938); Seif v. City of Long Beach, 286 N.Y. 382, 387 (1941); Matter of Zucker v. New York City Employees Retirement System, 27 A D 2d 207 (1st Dept. 1967); Application of Dooley, 65 Misc 2d 306 (Sup. Ct., N.Y. Co. 1971); see Restatement of Agency § 258.

The public policy behind the doctrine that a public official's promise ultra vires does not bind the State was well expressed in Judge Weinfeld's opinion in Sorenson v. City of New York, 99 F. Supp. 411 (S.D.N.Y. 1951), affd. 202 F. 2d 857 (2d Cir. 1953), cert. den. 347 U.S. 951. Although this was a civil case, the public policy and principles expressed in that case apply equally to plea bargaining cases. In Sorenson, Judge Weinfeld held that a seaman was not entitled to recover wages under an "implied contract" for overtime services rendered since the City officials whose conduct was relied upon as forming the basis for the implied contract had been without capacity under state law to enter into such an agreement. The policy behind this principle is obvious. As Judge Weinfeld said (at 416):

"Otherwise, commitment may be made either affirmatively or negatively which could involve the governmental unit financially and cause it embarrassment, or even lead to fraud and imposition upon it." (Emphasis added).

Here, Palermo himself has admitted that he knew that the Parole Board was not bound by any recommendations (A. 48-52, 62-63). Moreover, Palermo was represented at various stages by

two defense attorneys. Here, petitioner was represented by criminal lawyers who are presumed to know the legal authority of the public officials with whom they negotiated. Correale v. United States, 479 F. 2d 944 (1st Cir. 1973); United States v. Battle, 467 F. 2d 568 (5th Cir. 1972).

POINT III

THE DISTRICT COURT'S DECISION
SANCTIFIES THE RETURN OF SOME
OF THE STOLEN LOOT AND DEFIES
THE BASIC PURPOSE OF LAW.
STOLEN PROPERTY IS AN UNLAWFUL
CONSIDERATION. A "PLEA BARGAIN"
FOR THE RETURN OF STOLEN PROPERTY
IS NOT A PLEA BARGAIN WITHIN THE
MEANING OF SANTOBELLO V. NEW YORK
AND IS UNENFORCEABLE.

Whatever the exact nature of the commitment made to Palermo by the Queens District Attorney may have been, the agreement reached with Palermo for the return of stolen jewels was void as against public policy. Stolen jewels are an unlawful consideration. Palermo had no legal right to bargain with stolen property; Palermo had no legal right to conceal or withhold stolen property for any purpose. The fact that Palermo was plea bargaining does not change the result. Palermo cannot legitimize his otherwise illegal conduct by invoking the magic words "plea bargain" and thereby gain the benefits of Santobello v. New York, supra.

Santobello involved a plea bargain in which each side relinquished to the other side something which it was entitled to possess and was not otherwise obliged to surrender. This case is thus clearly not a "plea bargain" within the meaning of Santobello v. New York.

The District Court in its opinion never bothered to comment on this argument. At trial, the District Court dismissed this fundamental issue with the comment that it was something to argue before the jury (¶). The District Court was obviously in error since the question was one of law only. In any event the coordinate habeas claim was for the separate consideration of the court only and the subject required disposition by the Court and could not be shrugged off.

This case is analagous to a "bargain" made with kidnapers who hold hostages at the time the "bargain" is reached. Such bargains are obviously unenforceable since there is no lawful consideration. Although this case does not involve hostages, the identical principles come into play.

In United States v. Gorham, 523 F. 2d 1088 (D.C. Cir. 1975), the Court found that a promise of immunity from a federal judge and a Corrections Commissioner made to inmates who were holding the Commissioner hostage was not binding on the United States Attorney. Part of the holding was grounded on the theory that the situation was not a Santobello situation because there was no lawful consideration and because the bargain involved the performance of a pre-existing duty. Clearly, the same principles are applicable here. Stolen jewelry was not a valid consideration with which Palermo could bargain and he was under a clear pre-existing duty not to conceal or retain stolen goods. See also United States v. Bridgeman, 523 F. 2d 1099 (D.C. Cir. 1975); Stamatiou v. United States Gypsum Co., 400 F. Supp. 431 (N.D. Ill. 1975) (plaintiffs demand for and receipt of \$25,000 from company in exchange for information concerning location of documents to which company had legal title violated Illinois theft law and plaintiff could not recover the money taken from him after his arrest); Blackwood v. State, 299 N.E. 2d 622 (Ind. App. 1973) (prisoner who withheld information concerning stolen coin collection in exchange for \$5,000 constituted crime of "attempted control of property by threat"); State v. Ashby, 195 A. 2d 635 (App. Div., N.J. 1963)^{agreement} by prosecutor with prisoner unenforceable where prisoner offers insufficient consideration).

In Heartshill v. State, 341 P. 2d 625 (Okl. Ct. Crim. App. 1959), it was held that a county attorney could not compromise the State's right to a criminal prosecution by accepting restitution of money of which the State had been defrauded and that any such agreement would be in violation of public policy and not binding. The Court declared (at 635):

"It would place a premium on fraud and create an avenue of escape when the fraud was discovered. The law does not trifle with itself in such matters."

Even Palermo challenges the legitimacy of the entire transaction. Palermo expressed the view that in his opinion the District Attorney should not have been a party to negotiations for the return of the stolen jewels and was acting outside his jurisdiction in doing so (Amended Complaint, par. 34). This opinion, of course, did not stop Palermo from entering into the negotiations.

In New York, the conditions under which a prisoner may receive consideration from public authority in exchange for restitution are strictly limited by law. Penal Law 65.10(2) permits restitution only as a condition of probation or conditional discharge. The Code of Criminal Procedure, in effect at the time, mandated that conditions of probation be imposed by the court, § 932(j). Obviously, Palermo's case did not fall within any of these categories.

In effect, Palermo was using jewelry stolen in one crime in one county as ransom and extortion for considerations on charges and/or convictions in three counties. The District Court's decision to uphold such a "plea bargain" is unconscionable and violates every notion of public policy. Such a result is especially appalling since \$1,000,000 worth of stolen jewels was never returned and has never been accounted for, a fact to which the District Court attached no significance. See Point IV, infra.

POINT IV

PALERMO'S FAILURE TO RETURN \$1,000,000
WAS A MATERIAL BREACH OF THE "PLEA BARGAIN".

Palermo has always claimed that he kept his bargain by cooperating in returning the stolen jewels. However, uncontradicted evidence in the hearing below in the form of an estimate established that some \$1,000,000 worth of stolen jewels, or approximately 25% of the total value, was never returned. It has never been recovered. No explanation for the missing \$1,000,000 has ever been offered by Palermo.

Assuming arguendo this "plea bargain" was a legitimate plea bargain at all, Palermo clearly materially breached the agreement. United States v. Nathan, supra.

The District Court discounted the missing \$1,000,000 because the Queens District Attorney never claimed there had been a breach. As this Court has noted, the application of formal contract principles to the criminal law is not favored. United States ex rel. Selikoff v. Commissioner of Correction, 524 F. 2d 650, 654 (2d Cir. 1975). Moreover, the Attorney General raised the issue prior to the hearing below in pre-trial papers. In any event, this Court has the inherent power to make an independent analysis of the bargain and the degree to which each party fulfilled its side of the bargain.

If, as the District Court thought, Mackell's letter of recommendation was insufficient to fulfill his part of the bargain, simple fairness required the District Court to make a finding as to whether Palermo kept his part of the bargain. If in fact both sides failed to keep their part of the agreement, the result in the case would be quite different.

The District Court's failure to attach any significance to a missing \$1,000,000 was egregious error. A finding is clearly warranted that the failure to return such an awesome amount of loot was a material breach on Palermo's part. Such a finding would render Mackell's efforts on behalf of Palermo more than necessary or at least in pari delicto with Palermo's performance. .

POINT V

SPECIFIC PERFORMANCE OF THIS "PLEA
BARGAIN" WAS UNLAWFUL AND INAPPROPRIATE.
AT MOST THE QUEENS COUNTY PLEA WAS THE
EXTENT OF THE COURT'S JURISDICTION.

The District Court awarded relief to Palermo by ordering specific performance of the alleged bargain as if this was a lawful contract. Indeed, the District Court went further than specific performance of the bargain and ordered that Palermo be released without parole supervision of any kind, even though it was parole which allegedly had been promised.

This was wholly improper. Santobello v. New York, supra, on which the District Court unhappily relied, requires that following a finding of a broken plea bargain, the case be remanded to the state courts for consideration of the question of relief. The Supreme Court said (at 263):

"The ultimate relief to which petitioner is entitled we leave to the discretion of the state court which is in a better position to decide whether the circumstances of this case require only that there be specific performance of the agreement on the plea. . .or whether, in the view of the state court, the circumstances require granting. . .petitioner. . .the opportunity to withdraw his plea of guilty."

Palermo had moved in the state court to withdraw his guilty plea in the Queens County Court. It was from this denial, as we have pointed out, that he was in the federal court upon habeas corpus. If successful, he should have been given at the most "the opportunity to withdraw his plea of guilty", as provided in Santobello. The District Court obviously was motivated by the return of part of the loot and compulsion of the reward to the thief.

In that posture of the view of the District Court, under Santobello, a remand to the state courts was not only required in this case under the explicit teaching of the Supreme Court; it is also in the circumstances, appropriate. If it were necessary for the illegal act to be given legal effect by the courts in this case in order to achieve justice, that should be done by a state court. A state court should be given the first opportunity to decide what relief should be awarded in these extraordinary circumstances. A federal court cannot and should not impose an unlawful act on the State on federal habeas review except as a last resort.

Appellant disputes the conclusion of the District Court that specific performance must be awarded because a vacatur of the pleas in Queens County would be "meaningless" (A. 34).

As this Court recently noted, application of principles borrowed from contract law and commercial law "are inapposite to the ends of criminal justice." United States ex rel. Selikoff v. Cormis-sioner, supra at 654. The truth is that the vacatur of the Queens County pleas would not be meaningless. Such a vacatur would place Palermo in the prior status quo, in which he faced charges in Queens County and was serving his Richmond County sentence. The only difference would be that Palermo would no longer have control over the stolen jewels. However, Palermo never had the right to control and withhold stolen jewels in the first place; accordingly to lose that "right" in a plea vacatur is to lose nothing to which he is entitled. See Point III, supra.

Assuming arguendo specific performance was the appropriate remedy, the District Court acted excessively and seriously erred in releasing Palermo without parole supervision. The alleged plea bargain was to get parole for Palermo. Any specific performance therefore should do exactly that - place Palermo on parole.

The strange reaction of the District Court to this is indefensible. The Court declined to put Palermo on parole (1) because it feared retaliation by the Parole Board because of

Palermo's "victory", and (2) because Palermo never had the opportunity to complete five years of successful parole supervision resulting in absolute discharge from sentence (491, 496). Correction Law 212(8).

With respect to the first point, there was no evidence whatever in this case of a vindictive attitude by the Parole Board. There was no evidence whatever that the Parole Board would treat Palermo any differently than anyone else on parole. Palermo never scored any "victory" over the Parole Board in the trial below.

With respect to the second point, the fact is that only a tiny percentage of discharges from parole every year are discharges pursuant to Correction Law 212(8).^{*} Accordingly, the likelihood that Palermo would have been discharged from parole pursuant to Correction Law 212(8) even if he had been paroled in 1970 is, to say the least, extremely remote. Moreover, the Court noted that the evidence that the "deal" included only five years parole supervision was "tenuous" (485).^{**}

-55-

^{*} The Department of Correction's Annual Statistical Report: 1974 Data: Inmate and Parole Populations, p. 47 shows that for 1974 only 4% of all parole discharges were pursuant to Correction Law 212(8). Percentages for previous years were similar.

^{**} By the time the District Court wrote its opinion, this "tenuous" evidence had been transformed into a finding of fact.

POINT VI

JUDGMENT IN FAVOR OF MACKELL,
LUDWIG AND OTHER DEFENDANTS
SHOULD BE ENTERED NUNC PRO
TUNC AS OF JULY 26, 1971.

The District Court in its final judgment of May 19, 1976, entered judgment in favor of Mackell, Ludwig and numerous other defendants against whom the complaint had been dismissed finally by Judge Mansfield on July 26, 1971. This is in the coordinate civil action.

This portion of the judgment should have been entered nunc pro tunc as of July 26, 1971. Palermo had counsel for more than two years prior to the hearing below. Nothing was ever done by them about entering a final judgment pursuant to Rule 54(b), FRCP, in favor of Mackell, Ludwig and other defendants so that an appeal could be taken. Indeed, at the hearing below, it appears that the problem was first considered on the day of trial (248). Counsel considered, but rejected, the possibility of asking the District Court at trial to have Mackell "reinstated" as a party (240). The District Court itself properly rejected such an idea as "a violation of due process and improper in every conceivable way" (241).

It should be noted that even at the hearing below, it was the District Court which first raised the issue in mid-trial (239, 247, 248), and immediately after the trial (476-478). The judgment below permits an appeal which if it was to be taken at all, it should have been taken years ago.

POINT VII

IT WAS AN ABUSE OF DISCRETION FOR THE DISTRICT COURT TO DENY DEFENDANTS JONES AND OSWALD COSTS AND ATTORNEYS' FEES IN THE CIVIL RIGHTS ACTION WHEN PLAINTIFFS FAILED TO PRESENT ANY EVIDENCE AT ALL THAT THEY WERE INVOLVED IN A PLEA PROMISE.

It has long been recognized as within the federal courts' inherent equitable power:

" . . . that attorneys' fees may be awarded to a successful part when his opponent has acted in bad faith, vexatiously, wantonly, or for oppressive reasons." F.D. Rich Co., Inc. v. Industrial Lumber Co., 417 U.S. 116, 129 (1974).

Accord, Alyeska Pipeline Service Co. v. Wilderness Society, ____ U.S. ____, 95 S. Ct. 1605, 1622 (1975); Hall v. Cole, 412 U.S. 1, 5 (1973).

The prosecution of defendants Oswald (former Chairman of the Board of Parole) and Jones (a former commissioner of parole) for damages under the Civil Rights statute is an outrageous example

of a bad faith prosecution, and it was a clear abuse of discretion for the District Court to deny them attorneys' fees. Alternatively, they should have at least been awarded costs. The District Court gave no reason for its refusal to make these awards.*

The history of this bad faith prosecution is extraordinary. Palermo and Saltzman had counsel over two years before the trial in this case. In defendants' first pre-trial memorandum of law, they argued that the evidence would show that neither of them made a promise about parole release for Palermo or Saltzman. Accordingly, they contended that they could not be liable for damages under 42 U.S.C. § 1983 since there could be no showing of personal responsibility for the alleged constitutional deprivation (September 22, 1975 memorandum at 12-13).

Upon receiving plaintiffs' pre-trial memorandum, it became clear that plaintiffs had no case against Oswald or Jones. Nowhere in that memorandum was it claimed that the defendants personally made a promise to either Palermo or Saltzman. Defendants then filed a reply pre-trial memorandum on this point arguing that the civil rights action should be dismissed as to these defendants (December 2, 1975 memorandum at 2-4). No dismissal was granted.

* For the purposes of this Point, Oswald and Jones will be referred to as "the defendants."

Defendants' counsel remained very troubled about the necessity of proceeding to trial on the civil rights action. Accordingly, on the morning of trial, in the robing room, defendants' counsel again raised the issue of their involvement in the action (2-3):

"MR. McMURRY: As you know, your Honor, I represent Mr. Oswald and Mr. Jones. My first query would be, I would like to know -- I withdraw that. Judge Mansfield in his 1971 decision stated that a cause of action relied [lay] if it can be shown that they personally made a direct promise of early parole or an early parole date.

Now, as I pointed out in my last memorandum of law, Mr. Palermo's attorney at that time, in his pre-trial memorandum, did not make the assertion that either Mr. Jones or Mr. Oswald [Oswald] made that kind of commitment. Mr. Oswald, as a matter of fact, was not even mentioned in that memorandum.

I would like to know now if plaintiff's counsel intend to prove what they have to prove according to Judge Mansfield's decision; namely, whether they personally entered into a direct promise of that kind.

If they are not prepared to prove that, then I think as far as my clients are concerned the case should be thrown out now and she should [not] be exposed to any risk in front of a jury. If they are prepared to prove that, that is fine.

MR. TAIKEFF: I am prepared to prove that, your Honor.

THE COURT: We ought to go to trial. I am not going to dismiss anything before the trial. Let's see how the evidence stacks up and after the plaintiff's case we will see what motions are in order."

Palermo's counsel, having stated on the record that he was prepared to prove a direct promise by the defendants at trial, did no such thing. In fact, plaintiffs offered no testimony whatsoever as to any promise, direct or indirect, by either defendant.

As to defendant Oswald, there was no testimony at all during the entire trial; his name was never even mentioned in connection with a promise. As to defendant Jones, plaintiffs disproved their own case. Two of their witnesses testified that they had a meeting with Jones and that he had not made any commitment with regard to plaintiffs' parole release (215, 257, 360, 384).*

At the close of plaintiffs' case, defendants' counsel then moved to dismiss as to the defendants on the ground that "there is not a scintilla of evidence" that they made a promise. Palermo's

-60-

* Palermo testified that Bobick told him that a parole commitment was made at this meeting with Jones, at which Bobick was not even present (ante at 9-10). While this hearsay was arguably relevant to Palermo's state of belief regarding the plea aspect of the habeas side of the trial, it was not admissible against the defendants in the civil rights action. Moreover, it was patently not intended to be since Palermo called two witnesses who testified that in fact no promise was made by Jones.

counsel replied: "We will consent to the entry of that order with respect to those two defendants." (447). The case against the remaining defendant, a city policeman was also dismissed.

If there were ever an example of a bad faith, oppressive, vexatious, and wanton prosecution, the prosecution of these defendants under 42 U.S.C. § 1983 is it. It is unconscionable that the federal courts be used in such an unseemly fashion. It would be bad enough to simply fail to introduce sufficient evidence to state a prima facie case but to specifically represent to the Court that one will do so, fail to do so, and then concede the point by consenting to the dismissal of one's own case is a gross insult to the Court.*

-61-

* Although a lawyer must represent his client zealously, he must do so within the bounds of the law. Canon EC7-1, Code of Professional Responsibility. Canon EC7-4 states that he is not justified in asserting a frivolous position in litigation. Only recently this Court assessed double costs, to be taxed personally against a petitioner's lawyer, when that lawyer knowingly presented this Court with a frivolous petition to review a deportation order. Acevedo v. INS, ___ F. 2d ___ (April 29, 1976) (Slip. Opin. 3517). This Court warned against abuse of the judicial process and needless waste of the judiciary's time and resources. Slip. Opin. at 3521.

Awards of attorneys' fees for bad faith prosecutions have been made in several types of cases. When a defendant has forced the bringing of an unnecessary action which he compelled by unreasonable obstinacy, the courts have not hesitated to award the plaintiff attorneys' fees. E.g. Class v. Norton, 505 F. 2d 123, 127 (2d Cir. 1974); Stolberg v. Members of the Board of Trustees, 474 F. 2d 485, 490 (2d Cir. 1973). The same holds true when a party makes a frivolous and groundless motion. E.g. Undersea Eng. & Const. Co. v. ITT, 429 F. 2d 543, 545 (9th Cir. 1970). See Local No. 149 I.U.J.A., A & A. I.W. v. American Brake Shoe Co., 298 F. 2d 212, 214-215 (4th Cir.), cert. den. 369 U.S. 873 (1962).

Attorneys' fees have also been awarded on bad faith grounds when a defendant has delayed in complying with controlling Supreme Court and Court of Appeals decisions and raised frivolous defenses in an action. E.g. Doe v. Poelker, 515 F. 2d 541, 547-548 (8th Cir. 1975), pet. for cert. filed, 44 U.S.L.W. 3242 (September 20, 1975). In Newman v. Piggie Park Enterprises, 390 U.S. 400 (1968), the Supreme Court reversed a decision holding that a statutory provision for attorneys' fees to the prevailing party was to be limited

to a situation wherein defenses were interposed for delay and not in good faith. However, the Court strongly noted that there would be no question of not awarding fees in that case since, inter alia, the defendants had interposed patently frivolous defenses and failed to undertake to support the denials at trial. Id. at 402, n. 5.

The prosecution of the defendants under § 1983 was the obvious converse of the Newman situation. It was clearly in bad faith to force the defendants to trial when plaintiffs had no intention of presenting any case against them. While an award of attorneys' fees is a matter left to the reasonable discretion of the trial judge, that discretion is not absolute and it may be reviewed on appeal. E.g. Alpine Pharmacy, Inc. v. Chas. Pfizer & Co., Inc., 481 F. 2d 1045, 1050 (2d Cir.), cert. den. 414 U.S. 1092 (1973). Given the specific facts of this case, which on the record manifest blatant bad faith, it was an abuse of discretion to deny defendants attorneys' fees.

Alternatively, the District Court should have at least allowed costs to defendants as the prevailing parties in the litigation. Fed. R. Civil P. 54(d).^{*} That rule provides that costs "shall be allowed as of course to the prevailing party unless the Court otherwise directs."

While the District Court plainly has the power to deny costs (See Farmer v. Arabian American Oil Co., 379 U.S. 227, 232 [1964]), its discretionary power is not unfettered. E.g. Popeil Brothers, Inc. v. Schick Electric Co., Inc., 516 F. 2d 772, 774 (7th Cir. 1975); Trans World Airlines, Inc. v. Hughes, 515 F. 2d 173, 178 (2d Cir. 1975), cert. den. ____ U.S. ____, 44 U.S.L.W. 3473 (February 23, 1976). The presumption in favor of granting costs can be overcome only when there is an equitable reason for the denial. The denial of costs is "in the nature of a penalty" (Chicago Sugar Co. v. American Refining Co., 176 F. 2d 1, 11 [7th 1949], cert. den. 338 U.S. 948 [1950]) and must be based on the bad faith actions of the prevailing party, such as harassment, encumbering the record, or the calling of unnecessary witnesses.

^{*} Defendants' objections to plaintiffs' proposed judgment clearly requested the award of attorneys' fees and costs. Letter to District Court from Assistant Attorney General Ralph McMurtry, May 14, 1976.

E.g. Popeil Brothers, Inc., supra, 516 F. 2d at 774-775 and cases cited therein; Chicago Sugar Co., supra; Esso Standard (Libya), Inc. v. SS Wisconsin, 54 F.R.D. 26 (S.D. Tex. 1971); Electronic Specialty Co. v. International Controls Corp., 47 F.R.D. 158, 160 (S.D.N.Y. 1969). The burden is on the losing party to overcome the presumption for costs. Popeil Brothers, Inc., supra, 516 F. 2d at 775; Maldonado v. Parasole, 66 F.R.D. 388, 390 (E.D.N.Y. 1975).

Here the District Court denied defendants' costs and gave no reason whatever for that determination. ADM Corp. v. Speedmaster Packaging Corp., 525 F. 2d 662, 665 (3rd Cir. 1975). See Trans World Airlines, supra, 515 F. 2d at 178. It was a clear abuse of discretion to deny costs to the defendants when there has never even been an allegation of bad faith on their part. The District Court judgment should be reversed to the extent it denies costs and attorneys' fees to defendants Oswald and Jones.

CONCLUSION

THE GRANTING OF THE WRIT OF HABEAS CORPUS MUST BE REVERSED. IN THE ALTERNATIVE, PALERMO MUST BE PERMITTED OPPORTUNITY TO WITHDRAW HIS GUILTY PLEA IN QUEENS COUNTY. IF THE PAROLE BARGAIN CONTRARY TO OUR ARGUMENT IS TO BE ENFORCED, PALERMO MUST AT LEAST BE PLACED ON PAROLE OR PREFERABLY THE MATTER RELEGATED TO THE STATE COURT PURSUANT TO MANDATE OF SANTOBELLO.

JUDGMENT IN FAVOR OF MACKELL, LUDWIG AND OTHER STATE DEFENDANTS MUST BE ENTERED NUNC PRO TUNC AS OF JULY 26, 1971.

PALERMO AND SALTZMAN OWE DEFENDANTS JONES AND OSWALD COSTS AND ATTORNEYS' FEES WHICH SHOULD BE AWARDED.

Dated: New York, New York
June 28, 1976

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Warden,
State Defendants-Appellants

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

RALPH McMURRY
MARGERY EVANS REIFLER
Assistant Attorneys General
of Counsel

STATE OF NEW YORK)
COUNTY OF NEW YORK) : SS.:

Ralph McMurry, being duly sworn, deposes and says that he is employed in the office of the Attorney General of the State of New York, attorney for respondent, defendant-appellant herein. On the 30th day of June, 1976, he served the annexed upon the following named person :

Nancy Rosner
401 Broadway
NY NY

Harry Simmons, Esq
1 Chase Manhattan Plaza
NY NY
10005

William Walls, Esq
Corp Counsel
Room 1511
Municipal Bldg
NY NY

Attorney in the within entitled action by depositing a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorney at the address within the State designated by them for that purpose.

Ralph McMurry

Sworn to before me this
30th day of June, 1976

Margaret Evans Rosner
Assistant Attorney General
of the State of New York